UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 10548
Issued to: Ralph Ervin RENFRO

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2129

RALPH ERVIN RENFRO

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 5.30-1.

By order dated 11 May 1977, an Administrative Law Judge of the United States Coast Guard at Houston, Texas, suspended Appellant's seaman's documents for four months outright plus four months on eight months's probation upon finding him guilty of negligence. The specifications found proved allege that while serving as operator of the towboat MISS SYLVIA under authority of the license above captioned, on or about 8 July 1976, Appellant:

(1) failed to keep out of the way in a crossing situation of the downbound vessel SEA HARMONY at New Orleans in the Mississippi River;
(2) negligently entered the Mississippi River with his tow without regard to "existing traffic," "causing a collision between the tow and SEA HARMONY;" and
(3) negligently cause a medium "oil pollution spill" and damage to SEA HARMONY

At the hearing, Appellant was represented by professional counsel and entered a plea of not guilty to the charge and each specification.

The Investigating Officer and Appellant joined in placing in evidence the record of testimony and accompanying exhibits compiled in the course of an investigation under R.S. 4450 and 46 CFR 4 into the MISS SYLVIA-SEA HARMONY collision.

At the end of the hearing, The Administrative Law Judge rendered a written decision in which he concluded that the charge and specifications had been proved. He then entered an order suspending all documents issued to Appellant for a period of four months outright plus four months on eight months' probation.

The entire decision was served on 16 May 1977. Appeal was timely filed and was perfected on 1 September 1977.

FINDINGS OF FACT

On 8 July 1976, Appellant was serving as operator of the uninspected towboat MISS SYLVIA and acting under authority of his license.

On that date, MISS SYLVIA, pushing two loaded tank barges into the Mississippi River from the forebay of the Inner Harbor Navigation Canal at New Orleans, attempted to cross ahead of M/V SEA HARMONY which, downbound in the bend of the River across from Algiers Point, was on the starboard side of MISS SYLVIA.

Appellant communicated by voice radio with the pilot of SEA HARMONY and twice proposed to cross ahead of that vessel, each time receiving a negative response. On third such proposal the pilot of SEA HARMONY gave a voiced assent to the proposal on the condition that Appellant assure a safe crossing ahead, but almost immediately perceived that the maneuver could not succeed.

In the resultant collision the bow of SEA HARMONY collided with the side of GULF STATES 3002, lead barge of MISS SYLVIA'S tow, with damage to both colliding vessels and with the discharge of oil cargo from the barge into the River.

No whistle signals were exchanged by the vessels and no danger signal was sounded by MISS SYLVIA at any time.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is urged that he erred by finding that a crossing situation existed and that he should have found that a meeting situation existed or that the case was one of "special circumstance" from the outset, under either of which theories appellant was faultless. It would follow then, if Appellant was not negligent in respect to the collision, the oil spill cannot be attributed to his negligence either.

APPEARANCE: Phelps, Dunbar, Marks, Claverie and Sims, New Orleans, La., by Gerard T. Gelpi, Esq.

OPINION

I

Before proceeding to the questions raised by Appellant on the merits of the decision, two matters concerned with the specifications must be clarified.

The first specification deals with an alleged violation of the

"crossing" rule, and the second with an intemperate entry into the Mississippi River. The third then alleged negligent spilling of oil and damage to SEA HARMONY. On its face this third specification arouses curiosity. A potential explanation is that the damage to SEA HARMONY was the cause of discharge of oil from that vessel. If so, it would be expected that the order of elements in the specification would be reversed and that the damage would have been alleged with the spill as a consequence. However, this proves not to be the case. The discharge came from one of MISS SYLVIA'S own barges and had no causal relationship with the damage to SEA HARMONY. (The damage to GULF STATES 3002, which actually brought about the spill, was not mentioned.) The specification therefore alleges two separate matters, inartfully grouped. Further, if they are considered as separated, one will allege only a negligent damaging of a vessel. This would be insufficient notice, without identification of the negligent act which brought about the damage.

The difficulty here may result from a misunderstanding of good practice in pleading and proof.

Damage to a vessel is a natural and probable consequence of collision. Since damage is not of the essence there is no need to allege damage as a result of collision, nor is there, of course, need to prove damage in order to prove collision. But damage may be an aggravating factor, or the lack of it may be a mitigating factor, and hence it may be proved without having been alleged.

Discharge of oil after collision is not such a natural and probable consequence of collision and an allegation of such a result is not superfluous. What is more, it is appropriately alleged since the discharge of oil, under separate statutory enactment, may be a fault even in cases not involving collision, and its allegation is properly framed in a separate specification even though it could also be alleged as a consequence of negligent collision in one specification.

The other matter is connection with the specifications in the disposition made by the Administrative Law Judge of the allegation that there was a negligent entering of the River without regard to existing traffic. This he "merged" with the specification dealing with the crossing situation. In the initial decision he made no "findings" of "proved" or "not proved" with respect to the specifications or the charge, but in his "Opinion" he states. "It is found herein that Respondent was negligent as alleged in the charge and specifications." Since the findings of fact, plus a statement in the "Opinion," that there was damage to SEA HARMONY as a result of the collision, cover all the concrete allegations, there can be inferred a finding that all three specifications were

found proved, and Appellant has, properly, so construed the decision.

II

Appellant's basic position is that SEA HARMONY and MISS SYLVIA were, by virtue of the intents of the pilot and the operator, respectively, governed by the rule for vessels meeting (Article 18, Rule I; 33 U.S.C. 203, Rule I) rather than by that for vessels crossing (Article 19,33 U.S.C. 204). When the precise language of the rules in Article 18 is considered, it is seen that there would be difficulty in the effort to convert an apparent crossing into an "end on, or nearly so..." situation, with Appellant demonstrating that he had complied with the rule he has chosen to claim as governing. But it is really inconsistent then to urge that if the situation is found not to be a "head and head" case under Article 18 it should be found instead to be governed by Article 27 (33 U.S.C.212), the rule of special circumstance.

It is one thing for a court to analyze a situation known only from trial evidence and find that a "special circumstance" had existed; one who proposes "special circumstance" has a burden to prove that departure from the rules was justified in his case. The Piankatank, CA4 (1937), 87 F.2nd 806; The Gratitude v. The Eutaw, D.C. ED Pa. (1882), 14 Fed. 479. It is an entirely different matter to assert that one rule rather than another applied, that the applicable rule was complied with, and then that conduct be judged as though no applicable rule could be ascertained.

In Appellant's case it is even more difficult to imagine because he complied with no known rule and exercised none of the care needed for the rare case outside the rules.

Appellant's first specific contention is that the nature of a situation is determined by the intent of those directing the movement of vessels, and thus the rule applicable is the one that the navigators think should be made applicable. He cites several decisions in support of his proposition. No exception can be taken to the principle in each decision once the fact situation is understood.

In The Victory (1896), 168 U.S. 410, for example, it was held that vessels approaching each other around bends in channels are not within the "crossing" rule. This is not to say that the "crossing" rule does not apply because the navigators choose otherwise; the non-application of the rule is determined by facts independent of the mental states of the navigators. The Court merely recognized that a channel bounded, say by two arcs of concentric circles is topologically identical, in the so-called

"rubber sheet geometry, "to a channel bounded by two straight parallel lines. The physical contours, not the whims of the pilots, determine the applicable rule.

So also, when vessels are in fact crossing and must intend to cross because of the nature of the water-body, minor variations do not alter the case. United States v. SS SOYA ATLANTIC, CA4 (1964), 330 F. 2nd 732.

The tow in the instant case and SEA HARMONY were not in fact proceeding in opposite directions in a river or in a marked channel or sequence of channels, such that the "road" they traveled was essentially determined by the contours of the waterway. Further, decisions cited involving a tug backing out of a slip or rounding up from a pier face are entirely irrelevant.

The nearest situation to the present case found in a judicial report is that in A.S. SKAUGAS (I.M. SKAUGEN) v T/T P.W. THIRJLE, DC Md. (1964), 227 F.Supp. 281. There, a principal channel was met at about right angles by a subsidiary one, from the left as viewed by an inbound ship in the main channel. A vessel in the subsidiary channel approaching the main channel could, in fact, turn left or right into the main channel or could, if it chose, proceed across the main channel into an anchorage. An inbound vessel was coming up the main channel toward the point of intersection. An outbound vessel was in the subsidiary channel intending to turn right into the main channel. This vessel saw, or claimed to see, a meeting situation and contended that Article 18 applied. Even though that vessel had in fact made a turn and was almost on a heading conformable to the channel line at the time of collision, the court held the encounter to be a crossing situation with that vessel,having the other on its starboard hand, the burdened vessel under the crossing rule.

In the instant case, the tow on proceeding from the Canal into the River could have turned left, turned right, or proceeded across. There is evidence that the general pattern of traffic at that place in the River would have led to an expectation that the tow would desire either to turn left immediately or cross the river to get "under" Algiers Point, but that there was little likelihood that it would be planning to turn right immediately. It is plain, however,that the physical relationship of the vessels at the inception of the encounter was that of vessels crossing with SEA HARMONY on the starboard hand of the tow.

Appellant urges that his application of the meeting rule is justified by the language exchanged between the vessels by radio. He points out that the speaker spoke in terms of "whistles." (It appears that the terms "passing" and "to pass" were used rather

than "meet" or "cross.") Appellant concedes that he twice proposed by voice radio a "two whistle passing" to SEA HARMONY and that twice that vessel's pilot "insisted" on a "one whistle passing." On the third "two whistle" proposal, Appellant points out, that pilot was admittedly about to sound a two blast signal on his ship's whistle and did advise by voice radio, "If you can make it across, if you are sure you can make it across, get it across right away." From this, Appellant urges, it was clear that he and SEA HARMONY's pilot had agreed that the situation was governed by Article 18 and not by Article 19.

There is no need to elaborate on the simple fact that the term "two whistle" as a spoken thing is conclusive of nothing and that knowledge that a vessel has sounded a two blast signal, of itself without more, gives no hint as to correctness or fault or even as to the type of situation extant. Appellant's own supporting material here belies the conclusion he urges. The only conceivable meaning that can be ascribed to the actions and words of the pilot of SEA HARMONY is: "You have twice proposed a crossing contrary to the rules and I have twice refused. Since you insist once more you may try to cross ahead of me." The substance of the "agreement" between himself and SEA HARMONY's pilot which Appellant has "proved" is simply an agreement to cross contrary to the rules.

Even if the parties had expressly agreed to some concoction of their own, or if they had "agreed" to call an overtaking a meeting, the facts and the law applicable would not have been affected. A comparable example is found in the record here, in which the Administrative Law Judge accepted a "stipulation" that the Inland Rules applied in the area of the encounter. Even if the parties had "stipulated" otherwise the Inland Rules would have applied because they do and they are the law.

With Article 18 clearly not applicable to the situation and Article 19 plainly controlling, the burden would have been on Appellant, under his theory of retroactivity of "special circumstance," to establish that in the lack of any statutory rule to apply he was forced to maneuver in a special circumstance and that he conducted his vessel properly in such conditions. Since there is a clear rule applicable the refuge cannot the sought. Appellant's own testimony completely confirms that his intent was to cross ahead of the oncoming SEA HARMONY on his starboard hand and then to turn right upriver. Any fault of the pilot of SEA HARMONY here does not absolve Appellant from his duty to obey the rules or excuse him from his established failure.

Since Appellant's fault in the collision is clearly established his second ground for appeal, that the discharge of oil was not the result of his negligence, has no merit. The discharge

was a direct result of the negligently caused collision.

ORDER

The order of the Administrative Law Judge dated at Houston, Texas, on 11 May 1977, is AFFIRMED.

R. H. SCARBOROUGH
Vice Admiral, U. S. Coast Guard
ACTING COMMANDANT

Signed at Washington, D. C., this 27th day of July 1978.

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